IN THE

Supreme Court of the United States

No. 9—October Term, 1951

DONALD R. DOREMUS and ANNA E. KLEIN,
Appellants,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE and THE STATE OF NEW JERSEY,
Respondents.

On Appeal From the Supreme Court of the State of New Jersey

SUPPLEMENTAL BRIEF FOR APPELLANTS

(As to Jurisdiction)

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Statement

This supplemental memorandum is written, with the permission of the Chief Justice, to allay certain doubts expressed by members of this Court at the oral argument on January 31, 1952, as to whether the Court can and should take jurisdiction of this case.

The question arose because of a claim by the defendants that the plaintiffs have no standing to bring this action. This claim by the defendants was confusing to counsel for the plaintiffs, since previously, by Pretrial Conference Order, the defendants had waived this defense (R6), and by their motion for summary judgment on the pleadings had admitted all the well-pleaded facts of the complaint.

With respect to the standing of plaintiff Anna E. Klein, as mother of the student directly affected by the unconstitutional practice complained of, defendants' objection might be conceded to have some color, since the daughter has been graduated from school during the course of this suit (although the New Jersey Supreme Court decided the case on the merits after her graduation). But as to the standing of both plaintiffs as taxpayers, defendants' objection has no substance whatsoever. The *fact* that they are taxpayers is admitted; the *law* that gives taxpayers the right to bring such an action as this one is clear, in the view of the courts of New Jersey and the United States Supreme Court.

I.

Plaintiffs' Standing as Taxpayers.

The law is clearly established in New Jersey that a taxpayer has a standing to institute an action to set aside

void or unlawful ordinances or laws. Generally this right is recognized by the courts in cases which involve an expenditure of public moneys, on the ground that the interest of a taxpayer in the application of public funds is direct and immediate. But, even where questions of taxation are not at all concerned, the right is recognized in matters of great public interest. In the instant case, there is, of course, involved an expenditure of public funds.

Cases in New Jersey in which such standing has been recognized are legion. The outstanding case is *Ferry* v. *Williams*, 41 N. J. L. 332 (Sup. Ct., 1879). In that case the court said:

> "The English rule, that the redress of wrongs, arising from usurpations and unlawful acts of public officers, which do not directly affect private persons or property, must be attained through the suit of the attorney general, has not been generally followed in the practice of this state. Indeed it is not uniformly observed in the mother country. Judge Cowen, in *People* v. *Collins*, 19 Wend. 56, refers to several instances of its infringement. Naturally, from the more democratic character of our institutions, greater relaxation of the rule would be likely to obtain among us; and accordingly we find that, from an early period, our courts have exercised a large discretion in annulling the illegal acts of municipal bodies and officers, and compelling the performance of their public duties at the instance of citizens and taxpayers who were not otherwise interested in the controversy than was the rest of the community, while the cases in which the attorney general has interfered for such purposes are quite infrequent. * * * Undoubtedly, most of the cases where private citizens have sued to prevent or redress public wrongs of municipal authorities, are those involving conduct which would lead to expenditure of public moneys, and so increase taxation, but this has arisen rather from the usual character of such wrongs, than from any reason upon which a

remedy would be afforded. *There are certainly instances of interference by the courts with official action affecting only public rights at the suit of private persons, where questions of taxation were not at all concerned, or were so remote from the matters complained of as not to be noticed in the decision.*" (Italics supplied.)

In support of *Ferry* v. *Williams, supra,* are *Millville* v. *Bd. of Education of Millville,* 100 N. J. Eq. 162; *McGuire* v. *De Muro,* 98 N. J. L. 684; *Fagan* v. *State Board of Assessors,* 80 N. J. L. 516; *Bott* v. *Secretary of State,* 63 N. J. L. 289, 298; *Oliver* v. *Jersey City,* 63 N. J. L. 96; aff'd 63 N. J. L. 634; *Middleton* v. *Robbins,* 54 N. J. L. 566 (Err. & App.), reversing 53 N. J. L. 555; *Dufford* v. *Staats,* 54 N. J. L. 286; *Austin* v. *Atlantic City,* 48 N. J. L. 118; *Dufford* v. *Nolan,* 46 N. J. L. 87; *Koons* v. *Atlantic City,* 134 N. J. L. 329; *Karins* v. *Atlantic City,* 137 N. J. L. 349; *Gimbel* v. *Peabody,* 114 N. J. L. 574; *Everson* v. *Bd. of Education,* 133 N. J. L. 350 (E. & A.).

The fact that the individual taxpayer's threatened financial loss might be microscopic is deemed by the courts, both in New Jersey and elsewhere, to be immaterial. In any city or state where there are thousands of taxpayers, the financial interest of any individual is bound to be small, but the courts have held that any financial interest, however infinitesimal, is sufficient. *McQuillan, Munic. Corp.* (2nd) Sec. 2751, page 958; *Bancroft* v. *Building Commissioners,* 257 Mass. 82, 153 N. E. 319; *Chippewa Bridge Co.* v. *Durand,* 122 Wis. 85, 99 N. W. 603; *Stroud* v. *Consumers Water Co.,* 56 N. J. L. 422.

Cases which defendants might cite in New Jersey purporting to hold that a single taxpayer cannot attack a municipal or state act unless he shows special injury beyond any injury he has in common with the rest of the public will be found upon examination to go only to the

choice of remedy, not to the right. The traditional method of testing a public act in New Jersey has been, until the recent revision of the New Jersey Constitution, by the ancient prerogative writs. Relief by the invocation of these writs has always been strictly construed and where the courts have refused relief to a taxpayer because of a lack of a showing of special injury the cases have only gone to the extent of denying the issuance of a particular writ —of certiorari or mandamus, as the case may be—the rationale of the decisions being that certiorari will be denied when there is another remedy, by indictment or by other civil action (such as injunction). *Oliver* v. *Jersey City*, 63 N. J. L. 96 (1899). In short, those cases do not deny an individual taxpayer's right to bring an action, despite the absence of any special injury, but merely declare that he may have selected the wrong remedy.

II.

The United States Supreme Court has recognized this rule.

The rule with reference to a taxpayer's attack on Federal legislation is concededly different. The leading case is that of *Massachusetts* v. *Mellon*, 262 U. S. 446. But that case safeguards the jurisdiction of the United States Supreme Court in taxpayers' suits where the attack is upon the action of a municipality or state. Mr. Justice SUTHERLAND, writing the opinion in *Massachusetts* v. *Mellon*, said (at page 486):

> "The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate, and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court. *Crampton* v. *Zabriskie*, 101 U. S. 601, 609, 25 L. ed. 1070, 1071."

In the same case, Mr. Justice SUTHERLAND referred to the case of *Bradfield* v. *Roberts*, 175 U. S. 291, in which the taxpayer's suit was sustained as against the District of Columbia and, as the court said, "therefore subject to the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation."

This Court, as recently as 1947, took jurisdiction of a case out of the State of New Jersey involving the precise provision of the First Amendment which is here involved. This was the case of *Everson* v. *Bd. of Education*, 330 U. S. 1, in which the plaintiff, Everson, was a taxpayer attacking a state law as being in violation of the First Amendment of the United States Constitution, exactly as the plaintiffs in this case have done. There is no substantial difference, jurisdictionally speaking, between that case and this.

III.

The standing of the plaintiff as the mother of a child affected by the statute.

It would appear that, since plaintiff Klein's daughter has been graduated from school since the institution of this action, the question involved is moot as to her and that, in this respect, this Court no longer has jurisdiction. Nevertheless, plaintiffs submit, this Court should retain jurisdiction in a matter of such importance to the general public.

It should be pointed out, in the first place, that the New Jersey Supreme Court, although advised at oral argument of the girl's graduation, nevertheless proceeded to decide the case on the merits. If this Court now hesitates to take jurisdiction of the case, the decision of the New

Jersey Supreme Court will stand as the last word on a subject of great interest to the country, and upon which there is a vast diversity of opinion in the various state courts.

The matter involved in this appeal concerns many more persons than Gloria Klein. Indeed, if only Gloria Klein were involved, this Court could conceivably refuse to take jurisdiction, in its discretion, regardless of her rights, on the ground that the question was not substantial enough for this Court to take cognizance of. By the same token, in view of the fact that the case is substantial and of great public concern, plaintiffs respectfully suggest that this Court should take jurisdiction and decide the case on the merits, despite the technical objection that the status of one of the plaintiffs has changed during the course of the litigation.

Whether or not this Court sees fit to entertain jurisdiction on this ground, the standing of both plaintiffs as taxpayers still persists.

CONCLUSION

Plaintiffs therefore submit that this Court has, and should exercise, jurisdiction over this appeal and determine the case on the merits.

Respectfully submitted,

HEYMAN ZIMEL,
Counsel for Appellants.